

October 27, 1999

Ms. Esther Dyson  
Internet Corporation for Assigned Names and Numbers  
4676 Admiralty Way  
Suite 330  
Marina Del Ray, CA 90232

**Re: Request for a Procedural Policy**

Dear Ms. Dyson:

**Introduction**

The Office of Advocacy, U.S. Small Business Administration, ("Advocacy") submits this letter to request that the Internet Corporation for Assigned Names and Numbers ("ICANN") adopt and publish a policy statement on major issues that affect domain name holders. ICANN has not issued a formal policy statement on such crucial matters as notice and comment, openness, and transparency. Procedural questions have arisen at almost every stage of ICANN's activities throughout its existence and are undermining the consensus needed for ICANN to operate effectively. Furthermore, Advocacy believes that procedural policies are mandated by ICANN's Memorandum of Understanding with the U.S. Department of Commerce ("DoC" or "Commerce Department") and through ICANN's Bylaws for the Interim Board.

Advocacy recommends that ICANN open a proceeding at its Los Angeles meeting in early November to solicit proposals and submissions on possible procedural policies. After receiving submissions, ICANN should issue a proposed procedural policy for public comment and then adopt a policy that incorporates the comments received. This process for drafting a policy should allow sufficient time for public input on all matters affecting material interests.

Also, ICANN should base its procedural policy on the Administrative Procedure Act. Regulatory actions by the Commerce Department are subject to the APA. Because of ICANN's close and particular relationship with the DoC, any procedural policy should be based on the APA and incorporate the same duties and protections.

Finally, a little over two weeks ago ICANN proposed amendments to its Bylaws and allowed 14 days for comment. These amendments would remove the only meaningful section in the Bylaws that deal with transparency and procedures. In that section's place, ICANN is proposing a vapid sentence that essentially removes all openness and transparency requirements on ICANN. Advocacy considers this proposal and the insufficient notice and comment period all the more evidence that a procedural policy is needed and needed *now*.

**Background**

The United States Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305, codified as amended at 15 U.S.C. §§ 634(a)-(g), 637, to represent the views and interests of small business within the U. S. federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in U.S. Federal agencies' policies, and communicating these proposals to the agencies. 15 U.S.C. § 634(c)(1)-(4).

Small businesses are a crucial element of the U.S. economy and the Internet. In 1998, there were 23 million small businesses in the United States, which represent more than 99 percent of all businesses in this country. Small businesses employ 52 percent of private workers and employ 38 percent of private workers in high-tech occupations. Virtually all of the net new jobs created in the United States in the past few years were created by small businesses.

Small businesses use of the Internet is rapidly expanding. In the past two years, small businesses with access to the Internet have doubled from 21.5 percent to 41.2 percent. Thirty-five percent of small businesses maintain a Web site and one in three maintain business transactions through their site. Any policy that detrimentally affects the ability of these small businesses to use the Internet would have a significant impact on this nation's economy and limit the effectiveness of the Internet as a tool of business, commerce, and communication.

## **1. Current Procedural Difficulties**

ICANN has been troubled from the beginning with questions about procedure and process. Commenters have repeatedly raised questions about ICANN's openness, accountability, and transparency, particularly since ICANN's actions in Singapore to adopt specific language for the registrar accreditation despite serious objections. Advocacy believes that these procedural concerns are legitimate, and, to the extent they are being ignored, de facto barriers are being erected to meaningful participation of small businesses and individuals in the ICANN decision-making process. Advocacy has broken these procedural concerns down into four different issue areas.

### **a. Notice to the General Public Insufficient**

Many of ICANN's notice deadlines are too short for small businesses and individuals to respond in a timely and informative manner. Far-reaching policy thus far has been adopted after very brief comment periods – which can be as short as a week. These brief comment periods were particularly noticeable at ICANN's latest public meeting in Santiago. For example: a proposal to lengthen the term of the initial at-large directors was posted August 18 with comment due by August 26; the staff report on at-large membership was posted August 11 with any comments due by August 26; bylaw amendments were posted September 16 and the deadline for public comment was Sept 27; comments on the Uniform Dispute Resolution Policy was posted on

September 29 and was due on October 13, comments for another set of Bylaw amendments were posted October 8 with comments due on October 22, and just last week on October 21 ICANN posted a draft charter for the Ad Hoc Working Group on Convergence with comments due before the meeting on November 2 - 4.

Furthermore, it is difficult for small businesses to monitor all of ICANN's activities as they are posted on several different Web pages without any organization or central list. In order to keep apprised of all the different actions and activities of ICANN, the Domain Name Supporting Organizations, and the constituency groups, an interested party must visit on a daily basis: [icann.org](http://icann.org), [dnso.org](http://dnso.org), [ipcc-meetings.com](http://ipcc-meetings.com), [www.ncdnhc.org](http://www.ncdnhc.org), and [bcdnso.org](http://bcdnso.org). Often times, these sites are poorly organized and notices of important actions are hard to find unless you are intimately familiar with the layout.

#### **b. Handling of Comments Problematic**

Procedural difficulties also extend to ICANN's handling of comments after they are received, including the posting of comments and consideration of comments. Comment posting is an important step in the overall process as it allows participants to view other submissions and to respond to them. The current organization of posted comments is jumbled and difficult to follow. The listings provide sparse information and that does not facilitate quick review of comments. Also, comments from several different proceedings are merged together into a single list, adding to the confusion.

On a related note, ICANN does not have any means of recognizing receipt of comments, as Advocacy discovered when its comments regarding the UDRP, which were filed on time, were not posted on ICANN's Web page. Upon further inquiry, Advocacy learned that ICANN had no record of the comments, even though Advocacy's e-mail program said that the comments had been sent and the office received no notification that the e-mail was not delivered.

#### **c. Scope of Authority Questioned**

Industry representatives, consumer advocates, and members of the U.S. Congress have questioned ICANN's scope of authority. Questions of authority have arisen during the adoption of the UDRP, the consideration of the proposed \$1 fee on all domain name registrants, ICANN's ability to enforce a definition of a "famous trade mark", and ICANN's ability to impose contracts upon all domain name registrants enabling them to take away the domain name at any time. These questions of authority and legitimacy are especially troublesome, because they are beginning to undermine the validity of ICANN's proceedings and eroding support for its efforts. It is imperative that boundaries be drawn on ICANN's authority so that its ability to strike a consensus is not impugned.

**d. Openness and Transparency Concerns**

Participants also have raised concerns about ICANN's consideration of comments once they are received. Because ICANN does not address comments directly nor refer to them in its decision-making process, many commenters believe that their comments were not given adequate consideration or were ignored out of hand. Regardless of the veracity of this claim, ICANN makes no meaningful effort to offer evidence that a process exists to ensure that all comments are considered.

Congressman Thomas J. Bliley, chairman of the House Commerce Committee, also brought attention to ICANN's closed board meetings. While some of the board meetings are now open, most board decisions seem to be made during private meetings with the discussions announced at public board meetings. Other meetings also remain closed, including special committees on IP address convergence and new generic TLDs. Advocacy understands that complete openness and transparency at all levels may not be feasible. However, decisions made at closed-door meetings and backroom dealings raise suspicions about ICANN's fairness – suspicions that are undermining ICANN's credibility.

**2. A Procedural Policy Is Necessary and Proper**

ICANN needs to adopt a written and enforceable procedural policy. It is not just a good thing to do; it is *essential*. Advocacy believes that ICANN's Bylaws for the Interim Board and the Memorandum of Understanding ("MoU") with the Commerce Department require it to adopt such a policy. Furthermore, a definite policy will further ICANN's goal of consensus. Without a definite policy, ICANN will continue to be hounded by questions of procedure, openness, and transparency, which will cast doubts on its ability to perform the tasks assigned to it by the Department of Commerce.

**a. A Procedural Policy Is Required by ICANN's Authority**

Advocacy is of the opinion that ICANN is required to create a procedural policy by its authoritative documents. Both the Memorandum of Understanding and ICANN's Bylaws for the Interim Board require the organization to develop and adopt procedural policies that will ensure openness and transparency.

The Memorandum of Understanding was intended to "promote the design, development and testing of mechanisms to solicit public input . . . into a private-sector decision making process." Section II.C.4. The MoU also directed ICANN to create a private-sector management system that reflects a bottom-up management, Section II.C.3. Both parties are to design, develop, and test procedures, Section II.B. V.A.1, and to manage the functions listed in the MoU in a transparent, non-arbitrary, and reasonable manner. DoC will provide expertise and advice on

methods and administrative procedures for conducting open, public proceedings concerning policies and procedures, Section V.B.2.

ICANN's Bylaws, before the recently proposed amendments, echo the MoU's emphasis on process. An entire article is dedicated to transparency and procedures. Advocacy finds the language of the first section, which has been targeted for deletion, particularly compelling:

ICANN shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. In addition to the specific procedures set forth in these Bylaws, the Initial Board shall investigate the development of additional transparency policies and transparency procedures designed to provide information about, and enhance the ability of interested persons to provide input to, the Board and Supporting Organizations. Any such additional transparency policies and procedures shall be widely publicized by the Board in draft form, both within the Supporting Organizations and on a publicly-accessible Internet World Wide Web site maintained by the Corporation (the "Web Site"). Any such additional transparency policies and procedures may be adopted only after a process of receiving and evaluating comments and suggestions has been established by the Board, and after due consideration of any comments or suggestions received by the Board.

#### Article III, Section 1

This language clearly and specifically directs ICANN to initiate and adopt a procedural process that facilitates meaningful public involvement. It provides a functional roadmap as to how ICANN should conduct itself while adopting a procedural process. Advocacy is gravely concerned by ICANN's recent proposal to strike this provision. This section is the only meaningful section in the Bylaws on transparency and openness, and ICANN is suggesting it be deleted, only allowing a 14-day comment period and scheduling the decision for a telephone meeting shortly thereafter. This entire process leads Advocacy to the conclusion that ICANN has already made its determination and has no intention of addressing, much less responding to, public comment.

#### **b. A Procedural Policy Is Necessary for Consensus**

Separate and apart from the procedural requirements of the Bylaws and the MoU, a process is necessary to reach the consensus necessary for ICANN to function. To arrive at a consensus, ICANN will need participation from industry, government, and Internet users. If people feel their participation is acknowledged and considered, they will be more willing to accept the decisions of ICANN. Many parties that wish to contribute to the ICANN process are not large corporations, individuals with flexible schedules, or English-speakers. A procedural policy will assist all of these people to give their input to ICANN. For example, a procedural policy will allow adequate time for response to ICANN proposals, which will improve comments and

encourage participation. It is important for consensus that ICANN be accessible and its procedure is clear and predictable.

### **3. Advocacy Requests that ICANN Initiate a Process to Adopt a Procedural Policy at the November Meeting in Los Angeles**

Advocacy requests that ICANN initiate a process, as required by ICANN's Bylaws for the Interim Board and the MoU with the DoC, to adopt a procedural policy. This process should begin immediately, at ICANN's meeting in Los Angeles at November 2 - 4. Time is of the essence; ICANN has operated too long already without procedure firmly in place. Therefore, Advocacy proposes the following schedule:

At its November meeting, ICANN should request submissions for a procedural policy. It should accept those comments up until two weeks before its first public meeting in 2000. At its first public meeting in 2000, ICANN should issue its own proposal on a policy statement and ask for comments up until two weeks before a second public meeting in 2000, scheduled for a time that would allow adequate opportunity for public comment (certainly no less than 60 days). At the second public meeting in 2000, ICANN Board should adopt a specific procedural policy, explaining reasons for its decision and replying to suggestions received during the comment period.

Advocacy believes that meetings scheduled to discuss these issues should allow sufficient time for adequate comment. A thorough and deliberative process is necessary to consider a procedural policy that will affect every action ICANN takes and impact every participant to the ICANN process.

At this time Advocacy only makes this one recommendation to ICANN on the specifics of a procedural policy. ICANN should model its procedural process after the APA. DoC is subject to the APA and because of the relationship between ICANN and DoC, Advocacy believes that it is necessary and appropriate to extend it to ICANN as well. The APA has been tested and proven as a "checks-and-balances" process that protects the rights of parties while giving those parties a meaningful opportunity to participate. Furthermore, DoC is charged under the MoU with providing expertise and advice on methods and administrative procedures. DoC is intimately familiar with the APA and can provide better advice and expertise on a procedural policy that will work for ICANN if it is based on the APA.

Advocacy understands that the international nature of ICANN will require that it consider and adopt policies to accommodate international concerns but a policy based on the APA should facilitate that. A full comment period initiated by ICANN will bring these issues to the fore, and ICANN should consider additional procedures to respond to comments. The APA should remain the base line for the policy.

## Conclusion

Small businesses throughout the world have a major interest in how domain names are governed. No one believes the task is easy, but no organization should assume to itself power to govern an international system without meaningful participation by those entities which have a major stake in the issue – not if it wants to remain credible and avoid becoming a target for an international investigation. What Advocacy is recommending here are some first steps for engaging stakeholders in ICANN's work. To summarize:

- ICANN should adopt a procedural policy to address four issues: notice to the general public, handling of comments, scope of authority, and openness and transparency. A procedural policy is required by the ICANN's MoU with the Commerce Department and by ICANN's Bylaws for the Interim Board and is necessary for ICANN to reach the consensus it needs to meet its duties under the MoU.
- ICANN should start the process of constructing procedural rules at its meeting in November in Los Angeles. Any delay would further exasperate the problem and would undercut ICANN's ability to fulfill its mandate under the MoU, namely, that ICANN accommodate the broad and diverse interest groups that make up the Internet community.
- ICANN should not adopt the proposed amendment that would reduce Article III Section 1 to a single vague sentence, as it runs counter to ICANN's duty under the MoU. Furthermore, a notice and comment period of 14 days did not allow sufficient time for meaningful public comment. Should ICANN reduce this section as proposed, it will serve as a signal to all interested parties, that ICANN does not consider openness and transparency a condition precedent to fair and informed decision making.

Sincerely,

/s/ \_\_\_\_\_  
Jere W. Glover  
Chief Counsel for Advocacy

/s/ \_\_\_\_\_  
Eric E. Menge  
Assistant Chief Counsel for Telecommunications